Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-846

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

vs.

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,
Garnishee-Appellant.

On Appeal From the Supreme Court of Minnesota

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The order of the Hennepin County District Court, Fourth Judicial District of Minnesota was not reported. A copy of this order is annexed hereto as Appendix A. The decision of the Minnesota Supreme Court which affirmed the Hennepin County District Court's order has not yet been reported. A copy of this opinion, including the dissenting opinion, is attached hereto as Appendix B.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. *The Nature of the Proceeding.* This is a civil action by appellee (hereinafter Savchuk) against appellant Rush (hereinafter Rush) for damages arising out of an automobile accident which occurred in Indiana in 1972. At that tme, both Savchuk and Rush were Indiana residents, and Rush and State Farm Mutual Automobile Insurance Company (hereinafter State Farm) were parties to a contract of automobile insurance issued in the State of Indiana wherein State Farm afforded automobile liability coverage to Rush. In 1973, Savchuk moved to Minnesota and thereafter commenced this action, predicating jurisdiction upon Minn. Stat. §571.41. This statute, as construed by the Minnesota Supreme Court, permits a Minnesota resident to obtain jurisdiction *quasi in rem* over nonresidents by garnishing the insurer of the nonresident when the insurer is doing business in Minnesota. Rush and State Farm moved the Hennepin County District Court of Minnesota to dismiss on several grounds, including that the Court lacked jurisdiction over the person and subject matter and that this garnishment procedure produced an unconstitutional exercise of jurisdiction. This motion was denied and appeal was taken to the Minnesota Supreme Court. This is an appeal from the decision and final judgment of that court holding that Minnesota's exercise of jurisdiction herein is not violative of the due process requirement of the Fourteenth Amendment to the United States Constitution.

2. *The Original Judgment Sought to be Reviewed.* The decision of the Supreme Court of Minnesota was filed on September 10, 1976, and the judgment sought to be reviewed was entered on September 27, 1976. A copy of

this judgment is annexed hereto as Appendix C. The original order of the Hennepin County District Court which was affirmed by the Minnesota Supreme Court is annexed hereto as Appendix A. The notice of appeal was filed on November 15, 1976 in the Hennepin County District Court which possessed the record at that time. The notice of appeal is annexed hereto as Appendix D.

3. *Statutory Provision Conferring Jurisdiction.* The statutory provisions believed to confer upon this Court jurisdiction of this appeal are 28 U.S.C. §1257(2) and, alternatively, 28 U.S.C. §2103.

4. *Cases Sustaining Jurisdiction.* Cases believed to sustain the jurisdiction: *Hanson v. Denckla*, 357 U.S. 235 (1958); *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954); *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930).

5. *Statutes Involved.* Minnesota Statutes §571.41: "Subd. 2 Garnishment shall be permitted before judgment in the following instances only:

(1) For the purpose of establishing quasi in rem jurisdiction

(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or

(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

(c) the defendant is a non-resident individual, or a foreign corporation, partnership or association.

(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

QUESTION PRESENTED

The Court's construction and application of Minn. Stat. §571.41 herein purports to give the Minnesota courts jurisdiction over a person who was not in Minnesota at any relevant time by permitting garnishment of the nonresident's contingent right to call upon his insurer to defend him in negligence actions in courts of competent jurisdiction. The decision of the Minnesota court requires the nonresident to either surrender to the improperly asserted Minnesota jurisdiction or suffer a default judgment and jeopardize his insurance coverage. The question is whether or not the garnishment procedure under Minn. Stat. §571.41 as construed and applied herein violates the nonresident's right to due process of law under the Fourteenth Amendment.

STATEMENT OF THE CASE

On January 13, 1972, Savchuk and Rush, both Indiana residents, were involved in an automobile accident in Elkhart, Indiana. Savchuk was a passenger in a vehicle operated by Rush. As a result of the accident, Savchuk allegedly sustained personal injuries. The involved automobile was insured by State Farm pursuant to a standard auto insurance policy which required State Farm to defend and indemnify Rush and further required Rush to cooperate in the defense of any suit against him. The policy was issued to Rush in Indiana. No suit was ever commenced in Indiana. Indiana has a guest statute which precludes liability for damages to the injured guest unless the operator's conduct amounts to willful or wanton misconduct. Ind. Stat. §9-3-3-1.

In June, 1973, Savchuk moved to Minnesota. In May, 1974, he caused a prejudgment garnishment summons to be served upon State Farm to attach its "indebtedness" to Rush. Disclosure was made by State Farm indicating no indebtedness. Thereafter, a supplemental complaint was served upon State Farm objecting to the disclosure and a summons and complaint seeking $125,000.00 in damages was served upon Rush in Indiana.

Rush and State Farm moved to dismiss on various grounds, including lack of jurisdiction by the Minnesota courts over Rush and the subject matter. It was contended in the trial court that such exercise of jurisdiction denied due process to Rush. The motion to dismiss was denied by the trial court and appeal was taken to the Minnesota Supreme Court. The constitutional question was framed by that Court as follows:

> "If the obligation of an insurance company to defend and indemnify its insured is a garnishable res, does its seizure and the resultant quasi in rem jurisdiction conform with constitutional requirements of due process?"

As the Minnesota Supreme Court correctly noted, the jurisdictional challenge herein was directly addressed to the constitutionality of the application of Minn. Stat. §571.41. The Court held that due process is not violated when jurisdiction is obtained pursuant to Minn. Stat. §571.41 where notice of the action is given to the nonresi-

dent, there is no personal exposure over and above the insurance res (policy limits) and the plaintiff is a resident of Minnesota.

The effect of this decision is that two nonresidents of Minnesota may be involved in an accident anywhere and yet Minnesota courts will subsequently acquire jurisdiction if the plaintiff establishes a residence in Minnesota and attaches an insurer's "indebtedness" in this state. Such a holding violates due process because the Minnesota courts have extended its jurisdiction extra-territorially without a valid basis for doing so, save the subterfuge of purported jurisdication *quasi in rem*.

The exercise of jurisdiction approved herein had its origins in *Seider v. Roth*, 17 N.Y. 2d 111, 269 N.Y.S. 2d 99, 216 N.E. 2d 312 (1966). Therein, a sharply divided court, in a four to three decision, upheld a New York resident's ability to obtain *quasi in rem* jurisdiction over a Canadian citizen for a Vermont accident by attaching the nonresident's insurer doing business in New York. Subsequently, the constitutional propriety of this procedure was challenged in *Simpson v. Loehman*, 21 N.Y. 2d 305, 287 N.Y.S. 2d 633, 234 N.E. 2d 669, *mot. for rearg, den.*, 21 N.Y. 2d 990, 290 N.Y.S. 2d 914, 238 N.E. 2d 319 (1968). A sharply divided court upheld the procedure; however, a reading of the concurring and dissenting opinions indicated a majority of the court disapproved of the *Seider* theory on constitutional as well as other grounds.

The *Seider* theory was also challenged in the federal courts. The procedure was declared unconstitutional in *Podolsky v. Devinney*, 281 F. Supp. 488 (S.D. N.Y. 1968). In *Minchiello v. Rosenberg*, 410 F. 2d 106 (2d Cir. 1968), the *Seider* procedure was held to be constitutional

in a six to three decision, although the majority invited the New York Court of Appeals to reexamine its holding in *Seider* because it might produce constitutionally impermissible results.

Aside from New York and now, Minnesota, *Seider* has been approved in only one other jurisdiction but only on a retaliatory basis. In *Forbes v. Boynton*, 113 N.H. 617, 313 A. 2d 129 (1973), New Hampshire approved the theory but only for those instances where a New Hampshire resident was attempting to obtain jurisdiction over a New York resident. The procedure would not be available if a nonresident resided in a state which had not adopted *Seider*. See *Robitaille v. Orciuch*, 382 F. Supp. 977 (D. N.H. 1974). *Seider* has been categorically rejected as a legitimate jurisdictional theory by state and federal courts in Oklahoma, Louisiana, California, Vermont, South Carolina, Missouri, Rhode Island, Utah, Connecticut and Massachusetts.

SUBSTANTIALITY OF FEDERAL QUESTION

The procedure approved herein, in its simplest terms, holds that an insurer's obligation to defend its insured can be characterized as a debt, which may constitute a basis for *quasi in rem* jurisdiction. A primary requisite for the exercise of such jurisdiction, however, is the presence of some *res* within the state. *Hanson v. Denckla*, 357 U.S. 235 (1958). The obligation of State Farm to defend Rush, however, would have a situs in every state in which State Farm does business. In attempting to bootstrap jurisdiction by parlaying an obligation to defend into an attachable *res* located in Minnesota, the Minnesota courts have only reaffirmed an unrealistic and illogical theory that

clearly lacks that "pretty close adhesion to facts" constitutionally required under such circumstances. *McDonald v. Mabee*, 243 U.S. 90 (1917).

Traditionally, *quasi in rem* jurisdiction, based on attachment or garnishment, has been directed at the absconding resident who cannot be found for personal service of process and at the nonresident who uses or owns property in the forum state. Such jurisdiction is intended to give the defendant a choice between defending or losing the *res*. Here, there is no such choice because the insurer will insist that the defendant appear and defend to avoid a default. The appearance or lack of appearance of the nonresident will materially affect the size of the *res* and hence the insurer's exposure. The nonresident, on the other hand, is confronted with the option of appearing in Minnesota and the possibility of exposing himself to a judgment in excess of his policy which may later be enforced in his home state or complying with the requirements of his contract of insurance requiring him to cooperate and appear or risk a forfeiture of coverage completely. In effect, because of the insurance contract, *in rem* jurisdiction has been converted to *in personam* jurisdiction. In short, neither the nonresident nor the insurer have a choice to defend or forfeit the *res;* both are subject to *in personam* jurisdiction even though the nonresident has absolutely no interests or contacts with the forum state.

This Court has made it clear that an individual's right to due process of law will be protected against state exercise based upon some contrived *in rem* or *quasi in rem* jurisdiction. *Home Insurance Co. v. Dick*, 281 U.S. 397 (1930); *Hanson v. Denckla*, 357 U.S. 234 (1958). Under the rule enunciated in *International Shoe Co. v. State of*

Washington, 326 U.S. 310 (1945), the exercise of jurisdiction over nonresidents violates due process if the nonresident does not have certain minimum contacts with the state such that the maintenance of the suit does offend traditional notions of fair play and substantial justice. Similarly, a state's interference with the rights and obligations of parties to an insurance contract issued out of state violates due process absent a sufficient state interest in the insurance relationship or in the underlying accident to justify such interference. *Watson v. Employers Liability Assurance Corp.*, 348 U.S. 66 (1954). In *Watson*, a Louisiana resident attempted to bring a direct action against the insurer of a nonresident manufacturer. Such direct actions against the insurer were permissible under Louisiana law but were excluded under the provisions of the insurance contracts which were written in other states. This Court held that due process was not violated because the forum state possessed sufficient interests: the accident occurred in the forum state, the plaintiff was a resident of the forum state at the time of the accident, the forum state had an interest in preventing tortious conduct to protect its medical institutions and personnel who have cared for the plaintiff and to save its citizens from the use of public funds to support incapacitated persons. In the case at bar, there was literally no contact nor interest vested in the State of Minnesota at the time the accident occurred. Such interest or contact only occurred 19 months later when the plaintiff moved to Minnesota at which time Minnesota acquired a second contact, vis-a-vis, the fact that State Farm did business in Minnesota as well as Indiana. Rush, however, at no time sought protection or benefit of the laws of this state. He did not commit any "act by which [he]

purposely avail[ed him] self of the privilege of conducting activities within [Minnesota], thus evoking the benefits and protections of [our] laws." *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Minnesota has no interest in or right to the regulation of an insurance policy issued in Indiana to an Indiana citizen even though State Farm happens to also do business in Minnesota.

The only significant contacts upon which Minnesota has seized jurisdiction over Rush are that the plaintiff's present residence is in this state and that Rush's insurer fortuitously does business in this state. These would have been insufficient contacts for the constitutional application of a direct action statute in *Watson* and accordingly, the constitutional validity of a judicial assertion of jurisdiction under the facts of this case is equally unconstitutional.

It is only a matter of time before other states react to this means of obtaining jurisdiction, if only out of retaliation. Indeed, New Hampshire has already done so. If this procedure is endorsed by other states, constitutional objections being momentarily ignored, then our state courts will be at the brink of an expansion of jurisdiction as revolutionary as the development of long arm statutes in the years following *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945). Insurance provided by nationwide insurers has become an accepted and standard aspect of the private and commercial lives of practically all Americans. And with the salutary benefit of insurance protection, the same Americans are exposing themselves to suit at least in New York and Minnesota at present, and perhaps other jurisdictions in the future. As intimated by the Court in *Minchiello v. Rosenberg*, 410 F. 2d 106, 119 (2d Cir. 1969) this procedure may produce unconstitutional results in cases involving multiple claimants from different jurisdictions. Therefore, the Minnesota residents may now seize the entire policy to the detriment of nonresident claimants pursuing their claims in another jurisdiction for a single accident involving multiple claims. For this reason, the *Minchiello* majority suggested that the New York courts reexamine *Seider* in light of the dissents in *Minchiello* before the decision is taken up defensively by other jurisdictions.

The *Minchiello* court also invites litigants to avail themselves of the federal court system to ameliorate the constitutional infirmities of this procedure. This invitation will be accepted in all future cases by removal to the federal district courts. The federal courts alone have the less cumbersome means of compelling witnesses to appear for depositions and testimony at trial. See Federal Rules of Civil Procedure, Rule 45. Furthermore, parties to litigation in the federal courts have available to them the means of transferring venue pursuant to 28 U.S.C. §1404.

> "While an influx of cases of this type in the federal courts is most unwelcome, we have here an unforeseen demonstration of the utility of diversity jurisdiction, by way of removal at the instance of a nonresident, to lessen the impact of an overly enthusiastic but not unconstitutional assertion of jurisdiction by another state." *Minchiello, supra*, 410 F. 2d at 119 (majority opinion on rehearing).

Contrary to the opinion of the *Minchiello* majority, the assertion of jurisdiction herein is not only enthusiastic but is equally unconstitutional and will only serve to increase the already overburdened civil calendar of the federal judicial system.

This influx of cases and the burden it will impose upon the United States District Court in Minnesota was recently discussed in *Miles v. Momsen Trucking Co.* (4-75 Civ. 378; D. Minn. 1976), attached hereto as Appendix E. Therein, the Court was constrained to follow the precedent of the decision of the case at bar but had "serious reservations regarding the procedure . . . meeting the requirements of 'due process', and [was] also concerned with the practical implications of the rule." Because of the inherent diversity of citizenship in these cases, the federal courts provide an amenable forum which, however, are already too congested. "Adoption of the rule here followed as an effort to provide for Minnesota residents a forum for prompt resolution of their disputes may create a cruel illusion." Appendix E, p. 39.

The procedure approved by the Minnesota Supreme Court herein pursuant to Minn. Stat. §571.41 does offend traditional notions of fair play and substantial justice. The jurisdiction of the various states is not without some limitation. The dissent of Mr. Justice Otis accurately depicts the state of affairs which this decision fosters:

> "Under the majority opinion, if my next door neighbor is negligently injured on my property, he is free to move to any other state where my homeowner's insurer transacts business and force me to defend there."

In fact, the procedure goes one step further. If a claimant is a resident of a foreign jurisdiction where no cause of action would lie, i.e., a guest statute, immunity, etc., that claimant simply has to establish a residence in Minnesota to avoid the affirmative defenses and other obstacles he might otherwise encounter. And Minnesota law will then

also be available to this transient claimant. See *Schwartz v. Consolidated Freightways Corp.*, 300 Minn. 487, 221 N.W. 2d 665 (1974). This construction of Minn. Stat. §571.41 only promotes flagrant forum shopping to the detriment of the nonresident insured and the insurer who never could have contemplated being exposed to such a jurisdiction in the absence of any substantial and meaningful contact with the forum.

CONCLUSION

Appellants respectfully request the Court to reverse, in all respects, the judgment and decree of the Minnesota Supreme Court.

Respectfully submitted,

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APPENDIX A

JEFFREY D. SAVCHUK,

Plaintiff,

vs.

RANDAL RUSH,

Defendant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Garnishee.

ORDER

File No. 706126

The above-entitled matter came regularly on for hearing before the undersigned, sitting as Judge of Special Term, on motion of the plaintiff on July 24, 1974 and the Court took said motion under advisement to give defendant and garnishee an opportunity to prepare, serve and file additional motions which were heard on August 15, 1974.

Richard Diamond, Esq., appeared as counsel for and on behalf of plaintiff, and James A. Roegge, Esq., appeared as counsel for and on behalf of defendant and garnishee.

Upon all the files, records and proceedings herein, and upon the arguments of counsel, IT IS ORDERED:

That plaintiff be, and hereby is, granted leave to serve and file a Supplemental Complaint making State Farm Mutual Automobile Insurance Company, the garnishee herein, a party to the above-entitled action.

That the motions of defendant and garnishee be, and hereby are, denied.

Dated: August 28, 1974.

BY THE COURT:

/s/ DOUGLAS K. AMDAHL
Chief Judge

MEMORANDUM

FACTS

On January 13, 1972 an automobile accident occurred in Elkhart, Indiana. The plaintiff, Jeffrey D. Savchuk, and defendant, Randal Rush, were involved in that accident and the present action arose out of such accident. At the time of the accident plaintiff and defendant were each residents of the State of Indiana. Defendant is still a resident of such state. Plaintiff, who was born October 21, 1953, was living with his parents at the time of the accident. He graduated from Elkhart (Indiana) Senior High School in June of 1972 and worked in Elkhart until June of 1973 when his parents moved to Minnesota and plaintiff moved with them. Plaintiff became employed with Commercial Steel shortly after his arrival in Minnesota and still works for that company. He was married on September 15, 1973 and since that time lives with his wife at 8447 Regent

Avenue North, Brooklyn Park, Minnesota. His affidavit filed herein states that he considers Minnesota to be his home of permanent residence and that he has no intention of leaving such state.

Defendant was insured for automobile liability through a policy issued by State Farm Mutual Automobile Insurance Company, which company is licensed to do business in Minnesota. A garnishment summons was served on said insurance company by delivering a copy thereof to the Commissioner of Insurance of the State of Minnesota pursuant to statute. A copy of the garnishment summons and the Summons and Complaint were personally served on defendant in Elkhart County, Indiana.

A form garnishment disclosure was served by mail upon plaintiff's attorney, and said disclosure stated that there was no amount due and owing the judgment debtor by the garnishee and that said garnishee had no property of defendant in its possession.

On July 24, 1974 the undersigned, sitting as Judge of Special Term, heard plaintiff's motion, pursuant to Minnesota Statute 571.51 for leave to file and serve a Supplemental Complaint making the garnishee a party to the action. On the date of such motion, the Court was informed that it was the intention of the attorney for defendant and garnishee to move the Court for other relief and plaintiff's motion was taken under advisement pending the further motions of the defendant and the garnishee. On August 15, 1974 the counsel for defendant and garnishee argued their motion moving the Court "for an Order dismissing the plaintiff's pretended cause of action on the grounds that this Court lacks jurisdiction over the subject matter and

the Court lacks jurisdiction over the defendant; that there is insufficiency of process; that there is insufficiency of service of process," and further moved the Court "for an Order dismissing the plaintiff's pretended cause of action on the ground that the defendant is entitled to judgment of dismissal on the pleadings pursuant to Rule 12.03 of the Minnesota Rules of Civil Procedure."

ISSUE

Is the obligation of an insurance company to defend a non-resident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi in rem jurisdiction in circumstances where the occurrence giving rise to an action occurs out of the State of Minnesota and the plaintiff is a resident of the State of Minnesota?

ARGUMENT

The Supreme Court of the State of Minnesota has not passed upon the question presented by the issue here. However, the United States District speaking through the late Judge Neville in *Rintala v. Shoemaker*, 362 F.Supp. 1044 D.C. Minn. (1973) considered the identical question, and in a thorough opinion determined the question in the affirmative and held that quasi in rem jurisdiction was valid under like circumstances. Judge Neville's analysis of the issue begins with a discussion of *Seider v. Roth*, 17 N.Y. (2d) 111, 269 N.Y.S. (2d) 99, 216 N.E. (2d) 312 (1966) the first reported case determining that the obligation to defend was a garnishable res and continues through a dis-

cussion of cases pro and con, and the Minnesota garnishment law which was amended in 1969 by adding subdivision 2 to M.S. 57.41 so that it now reads:

> "Subd. 2. Garnishment shall be permitted before judgment in the following instances only:
>
> "(1) For the purpose of establishing quasi in rem jurisdiction . . .
>
> "(c) the defendant is a nonresident indivdual
>
> . . .
>
> "(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

This Court is persuaded by Judge Neville's logic and feels that it could add little, if anything, to his opinion and adopts such opinion as the basis for its determination and adds only the following observation.

In *Turner v. Evers*, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (supra 1973) Judge Goldberg made the following observation which points up the necessity of basic garnishment law consideration:

> "Our attention has been directed to several cases rejecting *Seider*, and we have found several more. These cases do not hold that there is no jurisdiction in the constitutional sense. Rather they hold that the obligation due from the insurer to the defendant cannot be attached. (Jardine v. Donnelly (1964) 413 Pa.

474, 198 A.2d 513 (pre-Seider perfunctory opinion): Housley v. Anaconda Company (1967) 19 Utah 2d 124, 425 P.2d 390 (post-Seider but does not cite it); DeRentiis v. Lewis (1969) (R.I.) 258 A2d 464 (not 'property' within Rhode Island statute); Howard v. Allen (1970) 254 S.C. 455, 176 S.E.2d 127; (distinguishes New York from South Carolina attachment statutes); Government Employees Insurance Company v. Lashy (Mo. App. 1970) 454 W.W.2d 942 ('contingent' under Vermont statute); Kirchman v. Mikula (La. App. 1972) 258 So.2d 701 (interpretation of Louisiana 'direct action' statute.) None of these cases discloses statutes as broad as that in California or a course of interpretation similar to that here. Nor do they reveal the sort of independent parallelism between their local law and New York law like that between California and New York."

Since our garnishment law does now provide for prejudgment garnishment when the garnishee and the debtor are parties to a contract of insurance, the foregoing statement adds much weight to the determination by Judge Neville.

A further issue was raised in the arguments before this Court. Such issue arose by reason of language in Rule 4.04 of the Rules of Civil Procedure for the District Courts, which provides:

> "When quasi in rem jurisdiction has been obtained, a party defending such acts thereby submits personally to the jurisdiction of the court . . ."

The problem is, of course, that if the defendant does not come to the State of Minnesota to defend the action he is not cooperating with the insurance company and may be determined to have no coverage. If he does come to the state to defend the action, he submits, by reason of the foregoing rule, personally to the jurisdiction of the Court and may be subject to an in personam judgment in an amount over and above the limits of his insurance policy. While this Court feels that the rule would not be effective in this type of situation, it does not have to decide such issue for the reason that the plaintiffs have stipulated that they seek no judgment in an amount larger than that of the policy limits.

D.K.A.

APPENDIX B

NO. 268 (1975)
Hennepin County

JEFFREY D. SAVCHUK,

Respondent,

vs.

45556

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Sheran, C. J.
Dissenting, Otis, J.
Endorsed
Filed September 10, 1976
John McCarthy, Clerk
Minnesota Supreme Court

SYLLABUS

1. Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

2. Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," applies in cases

where jurisdiction is obtained pursuant to § 571.41, subd. 2, only to the extent of the defendant's policy limits.

3. Possible injustice to the defendant in situations where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

Affirmed.

Heard before Sheran, C. J., and Otis, Todd, MacLaughlin, and Scott, JJ., and considered and decided by the court en banc.

OPINION

SHERAN, Chief Justice.

Appeal by defendant, Randal Rush, and garnishee, State Farm Mutual Automobile Insurance Company (State Farm), from an order by the district court granting plaintiff's motion to file and serve a supplemental complaint and denying appellants' motion to dismiss the complaint. We affirm the decision of the trial court for these reasons:

(1) Minn. St. 571.41, subd. 2, was enacted by the legislature to permit garnishment of an insurer's obligation to an insured, even though not due absolutely and without contingency.

(2) Rule 4.04(2), Rules of Civil Procedure, which provides in part, "When quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," applies in cases where jurisdiction is obtained pursuant to § 571.41, subd. 2, only to the extent of the defendant's policy limits.

(3) Possible injustice to the defendant in situations where jurisdiction is obtained pursuant to § 571.41, subd. 2, can be controlled by application of the doctrine of forum non conveniens.

The case arose out of a single-car accident which occurred January 13, 1972, in Elkhart, Indiana. The accident involved a car driven by Rush and owned by his father, in which Jeffrey D. Savchuk was a passenger. The Rush car was insured by State Farm. Rush and Savchuk were both residents of Indiana at the time of the accident. Savchuk, a senior in high school when the accident occurred, moved to Minnesota with his parents in June 1973 and is now an employed and married resident of this state.

The instant action was commenced May 28, 1974, when Savchuk served a garnishment summons on State Farm. Service was made by delivery of a copy of the summons to the commissioner of insurance for the state of Minnesota, pursuant to Minn. St. 60A.19. A copy of the garnishment summons, along with copies of the summons and complaint, was also served personally on Rush in Indiana. The complaint alleged negligence and sought $125,000 in damages.

In response to the garnishment summons, State Farm disclosed pursuant to § 571.49 that nothing was due and owing Rush as judgment debtor. Savchuk then moved the trial court for permission to file a supplemental complaint making the garnishee, State Farm, a party to the action pursuant to § 571.51. Rush and State Farm responded by

moving for dismissal on the following grounds: Lack of subject-matter jurisdiction, lack of jurisdiction over the defendant, insufficiency of process, and insufficiency of service of process. Since the jurisdictional challenge raised by the motion to dismiss also raised a question as to the constitutionality of the application on these facts of § 571.41, the attorney general was invited to intervene. That invitation was declined. The respective motions were then heard by the court. His order granting Savchuk's motion for leave to file a supplemental complaint and denying the motion of Rush and State Farm to dismiss precipitated this appeal.

Two main issues are presented: (1) Is the obligation of an insurance company to defend and indemnify a nonresident insured under an automobile liability insurance policy a garnishable res in Minnesota for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs outside Minnesota but the plaintiff in the action is a resident of Minnesota? (2) If the obligation of an insurance company to defend and indemnify its insured is a garnishable res, does its seizure and the resultant quasi-in-rem jurisdiction conform with constitutional requirements of due process?

1. Appellants contend that an insurance company's obligation to defend and indemnify its insured cannot constitute a res garnishable under Minn. St. 571.41, subd. 2, because such an obligation is not "due absolutely, and without depending on any contingency," as required by

§ 571.43(1).[1] In effect, appellants argue that the prejudgment garnishment sanctioned by subd. 2 of Minn. St. 571.41 can be obtained only when the "due absolutely, and without * * * any contingency" language of § 571.43 (1) is first satisfied.

It seems to us that the intent of the legislature in enacting § 571.41, subd. 2, was to specify a limited number of instances in which garnishment (and quasi-in-rem jurisdiction) would be available before judgment, regardless of whether the debt on which the garnishment was predicated was due absolutely.

Several reasons support this conclusion. First, the language of § 571.41, subd. 2, itself indicates that the test for determining the validity of prejudgment garnishment when the garnishee and debtor are parties to a contract of insurance is not whether the debt is due absolutely but rather whether the garnishee "*may* be held to respond" for the claim asserted against the debtor. State Farm's *potential*

[1]Minn. St. 571.41, subd. 2, reads in part: "Garnishment shall be permitted before judgment in the following instances only:

"(1) For the purpose of establishing quasi in rem jurisdiction

"(a) when the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent; or

"(b) the defendant is a resident individual who has departed from the state, or cannot be found therein, or

"(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association."

Minn. St. 571.43(1) reads: "(1) [No person or corporation shall be adjudged a garnishee by reason of:] (1) Any money or other thing due to the judgment debtor, unless at the time of the service of the summons the same is due absolutely, and without depending on any contingency."

liability is conceded here, and *potential* liability is all that subd. 2 requires.[2]

Second, § 571.41, subd. 2, is both more recent in origin and more specific in language than § 571.43.[3] Because we perceive an irreconcilable conflict between these two statutory provisions, § 571.41, subd. 2, controls.[4] Minn. St. 645.26.

Third, our interpretation of § 571.41, subd. 2, as permitting prejudgment garnishment and the establishment of quasi-in-rem jurisdiction in the circumstances here presented is consistent with two often-stated positions of this court—namely, our interest in providing a forum to residents of this state and our determination in long-arm cases to extend the jurisdiction of our courts to the maximum

[2]In construing a statute less explicit than the one here in question, the court in Turner v. Evers, 31 Cal. App. Supp. 3d 11, 18, 107 Cal. Rptr. 390, 395 (1973), stated: "* * * We disagree with the proposition that the 'obligation to indemnify requires a valid in personam judgment against the insured,' and hold the obligation to indemnify requires only the *possibility* of a valid judgment either against the insured personally or depriving him of his property." (Italics supplied.)

See, also, Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

[3]Section 571.43 has remained substantially unchanged since 1957; subd. 2 of § 571.41 was added in 1969. Subd. 2 refers specifically to insurance contracts and seems to contemplate precisely the situation presented here. The fact that § 571.43 speaks of "judgment debtor," while § 571.41, subd. 2, applies in a prejudgment context also suggests a reason for being guided by the latter provision. Note, however, that § 571.41, subd. 3, does indicate that § 571.41, subd. 2, parties are properly to be referred to as judgment debtor and judgment creditor, even though no judgment has yet been obtained.

[4]See, Comment, 1 Wm. Mitchell L. Rev. 161, 176, for an analysis of the statute which reconciles the insurance provision of § 571.41 with the contingency provisions of § 571.43. Our view of the two enactments as irreconcilably in conflict was the view taken by the late Judge Philip Neville in Rintala v. Shoemaker, *supra*.

limits consistent with due process.[5]

We therefore hold that under § 571.41, subd. 2, an automobile insurance company's obligation to defend and indemnify its insured is a res subject to prejudgment garnishment for the purpose of obtaining quasi-in-rem jurisdiction when the incident giving rise to the action occurs outside the state of Minnesota but the plaintiff in the action is a resident of Minnesota.

2. The test for determining the constitutionality of the prejudgment garnishment procedure authorized by Minn. St. 571.41, subd. 2, is threefold: (1) Proper notice must be given to the defendant-insured, affording him adequate opportunity to defend his property; (2) the defendant cannot be exposed to liability greater than the amount of his insurance policy; (3) the procedure may be utilized only by residents of the forum state. Minichiello v. Rosenberg, 410 F. 2d 106, 117 (2 Cir. 1968, 1969); Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973).

Plaintiff was a resident of the state at the time this action was commenced,[6] and proper notice was given.[7] The constitutional issue therefore reduces to a question of de-

[5]See, B & J Mfg. Co. v. Solar Industries, Inc., 483 F. 2d 594 (8 Cir. 1973) (applying Minnesota law); State ex rel, Nelson v. Nelson, 298 Minn. 438, 216 N.W. 2d 140 (1974); Franklin Mfg. Co. v. Union Pacific R. Co., 297 Minn. 181, 210 N.W. 2d 227 (1973); Mid-Continent Freight Lines, Inc. v. Highway Trailer Industries, Inc., 291 Minn. 251, 190 N.W. 2d 670 (1971); Hunt v. Nevada State Bank, 285 Minn. 77, 172 N.W. 2d 292 (1969), certiorari denied sub. nom. Burke v. Hunt, 397 U.S. 1010, 90 S. Ct. 1239, 25 L. ed. 2d 423 (1970).

[6]Application of Minn. St. 571.41, subd. 2, must be limited to plaintiffs who are residents of the forum state, since without this connection the state would lack sufficient meaningful contact with the suit to justify the exercise of jurisdiction. Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969).

[7]Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 70 S. Ct. 652, 94 L. ed. 865 (1950), established the notice requirement.

fendant's potential liability if the procedure authorized by subd. 2 of § 571.41 is permitted. Appellants argue that Rule 4.04(2), Rules of Civil Procedure, which states in part that "[w]hen quasi in rem jurisdiction [is] obtained, a party defending such action thereby submits personally to the jurisdiction of the court," means that a defendant in Rush's position[8] would find himself exposed to potentially unlimited personal liability in an action in which the plaintiff originally could have obtained only quasi-in-rem jurisdiction. Because of Rule 4.04(2), appellants argue, quasi-in-rem jurisdiction, with liability limited to the policy amount, is transformed into personal jurisdiction with potential liability extended beyond the policy limits.

If appellants correctly state the effect of Rule 4.04(2) in these circumstances, it is obvious that due process would be violated. Rintala v. Shoemaker, 362 F. Supp. 1044, 1054; Podolsky v. Devinney, 281 F. Supp. 488 (S. D. N. Y. 1968). The underlying question here, however, is not the *effect* of Rule 4.04(2), but whether in fact the rule applies to a case of this kind.

New York was the first state to permit a procedure for obtaining jurisdiction similar to the procedure invoked here. Seider v. Roth, 17 N. Y. 2d 111, 216 N. E. 2d 312 (1966). New York also had a rule similar to Rule 4.04 (2), but when the issue of the rule's applicability was raised, the New York Court of Appeals simply held that it did not

[8]Most automobile insurance policies, including, apparently, the one here, contain a clause which requires the insured to cooperate with the insurer in the defense of any claim. If the insured fails to cooperate, the insurer need not indemnify. The practical effect of the clause means that defendants like Rush must defend in Minnesota or risk losing the right to be indemnified. Rintala v. Shoemaker, 362 F. Supp. 1044, 1054; Comment, 1 Wm. Mitchell L. Rev. 161, 180.

apply in Seider-type cases. Simpson v. Loehmann, 21 N. Y. 2d 990, 290 N. Y. S. 2d 914, 238 N. E. 2d 319 (1968) (per curiam opinion denying reargument). Thus, in New York, even though the defendant proceeds with the defense on the merits, he does not become personally exposed. New Hampshire has reached a similar conclusion. Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973). Today we do likewise.

Basic considerations of fairness underlie our decision. The United States Supreme Court has indicated that a defendant must act to purposefully avail himself of the privilege of conducting activities in the forum state before personal jurisdiction over him may be properly asserted. Hanson v. Denckla, 357 U. S. 235, 78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958). Defendant Rush had engaged in no such voluntary activity; personal jurisdicton over him could not be justified. Plaintiff's reduction of his claim to $50,000, the policy limits, is an implicit recognition of this fact.

But to say that *personal* jurisdiction would not be justified, and to hold, as we do, that Rule 4.04(2) has no application in cases where jurisdiction is obtained pursuant to Minn. St. 571.41, subd. 2, is not to say that *no* jurisdiction over the defendant can be maintained. On the contrary, considerations of fairness suggest the need for quasi-in-rem jurisdiction obtainable via a prejudgment garnishment procedure like that permitted by § 571.41, subd. 2. In cases of this kind, the insurer controls the defense of the case. Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. W. 2d 669 (1967). Minimum

contacts sufficient to provide a constitutional basis for the attachment and quasi-in-rem (as distinguished from personal) jurisdiction can be found in the fact that the insurer is present in the state, registered to do business and doing business here, and in the state's legitimate interest in protecting its residents and providing them with a forum in which to litigate their claims.[9] Rintala v. Shoemaker, 362 F. Supp. 1044, 1057; Forbes v. Boynton, 113 N.H. 617, 623, 313 A. 2d 129, 132.

We therefore held that due process is not violated when jurisdiction is obtained pursuant to § 571.41, subd. 2, provided that (1) proper notice is given to the defendant-insured, adequate to give him opportunity to defend his property; (2) that the defendant-insured's liability is limited to the applicable policy limits of his insurance contract; and (3) that the plaintiff in the action is a resident of the state at the time the action is commenced.

3. Appellants' argument that the procedure authorized by § 571.41, subd. 2, constitutes a direct action against the insurer was not raised below. The defendant, not the insurer, is the party sued. There is nothing in the statute which suggests that the insurer should be named as a defendant. Rintala v. Shoemaker, 362 F. Supp. 1044, 1051.

We recognize that other states have rejected the proce-

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[9]If a forum is not provided, and the plaintiff is thus denied ... opportunity to recover, the state may wind up as the "insurer," paying through its welfare and social assistance programs for the care of an individual injured by the insured. As was stated in Rintala v. Shoemaker, 362 F. Supp. 1044, 1052, the plaintiff in this case is a Minnesota resident, and "[i]t is this state which must protect and care for the plaintiff in the event of indigency [and] this state's services which plaintiff uses."

dure we approve.[10] We further recognize that some critics view Seider-type jurisdiction as a solution which creates more problems than it solves.[11] We limit our discussion of these problems to the following observations:

The potential hardship on defendants who may be required to come long distances to defend claims legitimately brought by Minnesota plaintiffs is reduced by the availability of convenient transportation and by the fact that in many cases the defendant's testimony can be obtained by deposition. Where this is not possible, the hardship and expense of travel will ordinarily be no greater for the defendant than it would be for the injured party should jurisdiction be refused.

A quasi-in-rem judgment against the defendant would apparently not work an estoppel against the defendant if

[10]Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970); Howard v. Allen, 254 S. Ct. 455, 176 S.E. 2d 127 (1970); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967); Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972) (interpreting Massachusetts law); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 2d 1387 (Okla. 1972); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975) (interpreting Connecticut law); Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970) (interpreting Federal maritime and Pennsylvania law).

[11]The most persistent and prolific critic is Professor David D. Siegel, who, since 1966, has written on Seider in annual supplementary commentaries to N.Y. Civ. Prac. § 5201 (McKinney Supp. 1975). Other critical commentary has appeared in Rosenberg, *One Procedural Genie Too Many or Putting Seider Back Into Its Bottle*, 71 Col. L. Rev. 660; Stein, *Jurisdiction by Attachment of Liability Insurance*, 43 N. Y. U. L. Rev. 1075; Note, 8 B. C. Ind. & Com. L. Rev. 147; Comment, 16 Buffalo L. Rev. 769; Comment, 67 Col. L. Rev. 550; Note, 71 Dickinson L. Rev. 653; Note, 64 Nw. U. L. Rev. 407; Note, 43 St. John's L. Rev. 58; Comment, 11 San Diego L. Rev. 504; Note, 19 Stanford L. Rev. 654; Comment, 5 Sw. U. L. Rev. 417; Comment, 1 Wm. Mitchell L. Rev. 161.

the plaintiff attempts to sue again outside the state of Minnesota to recover amounts beyond the policy limits. Minichiello v. Rosenberg, 410 F.2d 106, 112; Note, 65 Harv. L. Rev. 818, 834. Any hardship to the defendant arising out of a potential second suit against him is no more than has always existed in quasi-in-rem actions. Often, as here, a second suit will be impossible because the statute of limitations has run in the only available alternate forum. Ordinarily, a second suit against a remote defendant whose liability insurance has been exhausted would seem unlikely.

Finally, and most significantly, if jurisdiction is technically proper under § 571.41, subd. 2, but it nonetheless involves inconvenience for the defendant which outweighs the plaintiff's interest in a Minnesota forum and other relevant factors, then the trial court in its discretion can always grant a motion to dismiss on the grounds of forum non conveniens. Willoughby v. Hawkeye-Security Ins. Co. 291 Minn. 509, 189 N. W. 2d 165 (1971). In considering such a motion to dismiss, the trial judge would be justified in conditioning his ruling upon the willingness of the plaintiff to satisfy his claims against the defendant upon exhaustion of the policy limits.[12]

For the reasons stated, we conclude that it was not unfair on these facts to require defendant and State Farm to defend this action in Minnesota, and the decision of the trial court is therefore affirmed.

Affirmed. OTIS, Justice (dissenting).

[12]Imposition of such a condition would be consistent with the policy expressed in Rintala v. Shoemaker, *supra*, and consistent with our view that this type of jurisdiction should be limited so as to make its exercise fair to both the insurer and the insured.

This is a case wherein two residents of Indiana were involved in an automobile accident in Indiana. One of the drivers (Rush) had purchased an automobile liability policy from State Farm Mutual Automobile Insurance Company. A year and a half after the accident the other Indiana resident (Savchuk) left that state and moved to Minnesota, whereupon he commenced this lawsuit against Rush for injuries suffered in the accident. As Minnesota courts could not constitutionally assert personal jurisdiction over Rush, Hanson v. Denckla, 357 U. S. 235, 78 S. Ct. 1228, 2 L. ed. 2d 1283 (1958),[1] Savchuk sought to acquire quasi-in-rem jurisdiction.[2] However, Rush has no property in Minnesota. Consequently, Savchuk served a garnishment summons upon State Farm in an attempt to garnish any debt due and owing Rush by State Farm. In support of his action, Savchuk relies upon Minn. St. 571.41, subd. 2, relevant portions of which read:

"Subd. 2. Garnishment shall be permited before judgment in the following instances only:

"(1) For the purpose of establishing quasi in rem jurisdiction.

* * * * *

"(c) the defendant is a nonresident individual, or a foreign corporation, partnership or association.

[1]Rush did not commit any "act by which [he] purposefully avail[ed him]self of the privilege of conducting activities within [Minnesota], thus invoking the benefits and protections of [our] laws." Hanson v. Denckla, 357 U.S. 235, 253, 78 S. Ct. 1228, 1240, 2 L. ed. 2d 1283, 1298 (1958).

[2]See, Pennoyer v. Neff, 95 U.S. 714, 24 L. ed. 565 (1877).

"(2) When the garnishee and the debtor are parties to a contract of suretyship, guarantee, or insurance, because of which the garnishee may be held to respond to any person for the claim asserted against the debtor in the main action."

It is not disputed that Rush is a nonresident individual; thus, subd. 2(1)(c) is satisfied and this case is a proper case for the exercise of quasi in rem jurisdiction.[3] It is also not disputed that State Farm and Rush are parties to a contract of insurance within the meaning of subd. 2(2). The question is whether, and to what extent, any obligation owed by State Farm can provide a means by which Savchuk can obtain quasi-in-rem jurisdiction over Rush.

Quasi-in-rem jurisdiction over a nonresident by the service of a garnishment summons on the defendant's nationwide insurer is a creature of Seider v. Roth, 17 N. Y. 2d 111, 269 N. Y. S. 2d 99, 216 N. E. 2d 312 (1966). As the majority notes, the Seider procedure has been held improper as a matter of Federal maritime law[4] as well as of the law of almost all the states which have considered

[3]Subd. 2(1) is merely procedural, defining the types of defendants over which the exercise of quasi-in-rem jurisdiction is proper. Thus, a court must assert personal jurisdiction over a resident defendant who can be found within the state, and cannot proceed quasi in rem. Of course, subd. 2(1) does not say that quas-in-rem jurisdiction can be asserted over defendants there listed in all cases, for an additional element is needed—something to garnish, i.e., property located within this state. "If the non-resident have no property in the State, there is nothing upon which the tribunals can adjudicate." Pennoyer v. Neff, 95 U.S. 714, 723, 24 L. ed. 565, 569.

[4]Robinson v. O. F. Shearer & Sons, Inc., 429 F. 2d 83 (3 Cir. 1970).

it.[5] Only an inferior court in one other state has adopted it.[6] Commentary has been highly critical.[7] Even in the state of its birth, the procedure remains only because of the opinion of Judge Charles D. Breitel, in which Judge Bergan concurred, in Simpson v. Loehmann, 21 N. Y. 2d 305, 287 N. Y. S. 2d 633, 234 N. E. 2d 669 (1967), the case which reaffirmed Seider. Judge Breitel, appointed to the New York Court of Appeals after Seider, and replacing one of the judges who was in the 4-3 majority in that case, and Judge Bergan, who had dissented in Seider, cast the deciding votes in Simpson for the following reasons:

> "* * * Only a major reappraisal by the court, rather than the accident of a change in its composition, would justify the overruling of that precedent. Yet the theoretical unsoundness of the *Seider* case and the undesirable practical consequences of its rule require some comment if only, perhaps, to hasten the day of its overruling or its annulment by legislation.
>
> "It is the most tenuous of nominalist thinking that accords the status of an asset, leviable and attachable,

[5]Kirchman v. Mikula, 258 So. 2d 701 (La. App. 1972); State ex rel. Government Employees Ins. Co. v. Lasky, 454 S.W. 2d 942 (Mo. App. 1970); Johnson v. Farmers Alliance Mutual Ins. Co., 499 P. 1387 (Okla. 1972); Jardine v. Donnelly, 413 Pa. 474, 198 A. 2d 513 (1964); De Rentiis v. Lewis, 106 R. I. 240, 258 A. 2d 464 (1969); Howard v. Allen, 254 S. C. 455, 176 S. E. 2d 127 (1970); Housley v. Anaconda Co., 19 Utah 2d 124, 427 P. 2d 390 (1967). See, also, Tessier v. State Farm Mutual Ins. Co., 458 F. 2d 1299 (1 Cir. 1972); Kirchman v. Mikula, 443 F. 2d 816 (5 Cir. 1971); Sykes v. Beal, 392 F. Supp. 1089 (D. Conn. 1975); Ricker v. Lajoie, 314 F. Supp. 401 (D. Vt. 1970).

[6]Turner v. Evers, 31 Cal. App. 3d Supp. 11, 107 Cal. Rptr. 390 (1973). The decision cited in the majority opinion, Forbes v. Boynton, 113 N.H. 617, 313 A.2d 129 (1973), is discussed *infra*.

[7]See footnote 11 in the majority opinion.

> to a contingent liability to defend and indemnify under a public liability insurance policy.
>
> * * * * *
>
> "Accordingly, I concur to affirm but only because the institutional stability of a court is more important than any single tolerable error which I may believe it has committed." 21 N. Y. 2d 314, 287 N. Y. S. 2d 640, 234 N. E. 2d 674.

Some of the undesirable practical consequences have already arisen. Thus, New Hampshire has adopted the rule that if the nonresident defendant lives in a state which has adopted Seider—i.e., New York—then that defendant's insurer can be garnished in New Hampshire if the insurer does business there. Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973).[8] On the other hand, if the defendant lives in a state which has rejected Seider—e.g. Connecticut—then his insurer cannot be garnished. Robitaille v. Orciuch, 382 F. Supp. 977 (D. N. H. 1974). In Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S. 2d 521 (1968), New York was presented with a case in which a Norwegian resident attempted to garnish in New York the insurer of a North Carolina defendant with respect to an accident which took place in North Carolina. It was held that allowing garnishment in that case would violate the

[8]In Forbes the New Hampshire Supreme Court stated: "We are not holding that the *Seider* rule is to be applied generally to all cases of foreign motorists insured by a company with an office in this State and licensed to do business in New Hampshire. We are merely holding that under the circumstances of this case in a suit by a resident of New Hampshire against a resident of New York where the *Seider* rule prevails the trial court properly denied the defendant's motion to dismiss plaintiff's action." 113 N. H. 624, 313 A. 2d 133.

principles of forum non conveniens and due process.[9] In light of the fact that most of our sister states which have considered Seider have rejected it, that the commentary is uniformly critical, that a majority of the court which spawned Seider now believes it to be in error, and mindful of its potentially undesirable consequences, I would decline to adopt it in Minnesota. Whether or not it is authorized by § 571.41, subd. 2(2), in my opinion it is unconstitutional as applied to the defendant in this case.

The majority opinion limits the use of the Seider procedure to residents of Minnesota. This is probably constitutionally required.[10] As Judge Earl Larson said in Adkins v. Northfield Foundry & Machine Co. 393 F. Supp. 1079, 1081 (D. Minn. 1974):

> "One of the principal reasons to limit *Seider* type jurisdictions is that without such limitations, blatant forum shopping would be possible. * * * Further, this limitation is required to give the forum State a recognizable and protectable interest and to prevent an unfair burden that might be placed upon both the nonresident defendant and its insurance company."

In Rintala v. Shoemaker, 362 F. Supp. 1044, 1056 (D. Minn. 1973), the late Judge Philip Neville expressed the reasons behind this limitation:

[9]See, also, Nationwide Mutual Ins. Co. v. Vaage, 265 F. Supp. 556 (S. D. N. Y. 1967).

[10]Farrell v. Piedmont Aviation, Inc., 411 F. 2d 812 (2 Cir. 1969), affirming 295 F. Supp. 228 (S. D. N. Y. 1968); Vaage v. Lewis, 29 App. Div. 2d 315, 288 N. Y. S. 2d 521 (1968); Varady v. Margolis, 303 F. Supp. 23 (S. D. N. Y. 1968); Public Admr. of County of New York v. Unimar Shipping Co., Ltd., 401 F. Supp. 313 (S. D. N. Y. 1975); Rintala v. Shoemaker, 362 F. Supp. 1044 (D. Minn. 1973); Adkins v. Northfield Foundry & Machine Co., 393 Supp. 1079 (D. Minn. 1974).

> "The fear is that unless this limit is placed on *Seider* type jurisdiction blatant forum shopping would be possible since many insurance companies, including Aetna, do business in all fifty states. Further, the essential connection between the forum state and the accident at all, the connection which provides the forum state with a recognizable and protectable interest, is that the forum is the residence of the plaintiff. This limit on *Seider* jurisdiction is not only reasonable but it limits any inconvenience which the insurance company might suffer. The only additional state in which garnishment might be had is the resident of the plaintiff. * * *
>
> "* * * On the facts of this case Aetna is simply exposed to an action in one more jurisdiction than it would be otherwise. This certainly is no intolerable burden on it or a similarly situated garnishee."

In the case at bar, plaintiff and defendant were both residents of Indiana when this accident occurred.[11] At that time, under the limitation on Seider, Rush and State Farm were amenable to suit in only one jurisdiction—Indiana. If Savchuk had been a Minnesota resident at that time suit could have been brought in only two states—Indiana and Minnesota. However, if jurisdiction is permissible in this case Rush and State Farm are amenable to suit in all 50 states.

[11]Plaintiffs statement of the case indicates that all of the witnesses and records, as well as a treating physician, are located in Indiana, except for plaintiff's family and two Minnesota physicians who, presumably, treated him after he moved to Minnesota.

If a motorist in another state drives negligently and injures a Minnesotan, a strong case can be made that this state's interests are sufficiently great to allow our courts to use the Seider procedure for obtaining jurisdiction over the case. As Judge Neville put it, such a motorist "is simply exposed to an action in one more jurisdiction than [he] would be otherwise." 362 F. Supp. 1056. However, allowing a potential plaintiff to move to this state after his cause of action has arisen and to invoke Seider to bring the case to Minnesota means that a plaintiff has a choice of 50 jurisdictions in which to sue. Such a result in my opinion violates due process.[12] Rush did not injure one who was a Minnesota resident on the day of the accident. He should not be forced to defend himself in a Minnesota court.

Under the policies of Schwartz v. Consolidated Freightways Corp. 300 Minn. 487, 491, 221 N. W. 2d 665, 668 (1974)—advancement of Minnesota's governmental interests and application of the better rule of law—Minnesota's comparative negligence law, and not Indiana's contributory negligence law, will apply. Thus, if Rush injures another Indiana resident in Indiana, and that person is able to establish residence in a new jurisdiction, he may use Seider to bring the defendant in and defend, and avoid Indiana's contributory negligence law. Under the majority opinion, if my next-door neighbor is negligently injured on my property he is free to move to any other state where my homeowners insurer transacts business and force me to defend there.

[12]In the only reported case where this issue was presented, Robitaille v. Orciuch, 382 F. Supp. 977 (D. N. H. 1974), jurisdiction was denied on other grounds. See the discussion of Robitaille and Forbes v. Boynton, 113 N. H. 617, 313 A. 2d 129 (1973), *supra*.

The majority opinion's answer is that the defendant is free to move to dismiss on grounds of forum non conveniens. However, that presupposes jurisdiction, which I cannot accept.[13]

Accordingly, I would reverse and hold that Minn. St. 571.41, subd. 2(2), is unconstitutional as applied to this case. It would not then be necessary to reach the issue of whether Seider is to become the rule of this state.

[13]"The district courts of this state may fairly exercise their discretion in declining to accept jurisdiction of transitory causes of action brought here by citizens or noncitizens of this state who are nonresident when it fairly appears that it would be more equitable that the cause of action be tried in some other available court of competent jurisdiction." Johnson v. Chicago B. & Q. R. Co., 243 Minn. 58, 79, 66 N.W. 2d 763, 776 (1954).

APPENDIX C

STATE OF MINNESOTA

ss

SUPREME COURT

MANDATE

DC 706126

THE STATE OF MINNESOTA

To the Honorable Judge and Officers of the District Court within and for the County of Hennepin Greeting:

WHEREAS, Lately in your Court, in action there pending, entitled Jeffrey D. Savchuk, Plaintiff vs. Randal Rush, Defendant, and State Farm Mutual Automobile Insurance Company, Garnishee, a certain order was entered therein August 28, 1974 from which action of your Court an appeal thereafter was taken to this Court;

AND WHEREAS, The said cause came on to be heard before our Supreme Court, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the Court below herein appealed from, be, and the same hereby is, in all things affirmed and that judgment be entered according. A copy of the entry of judgment thereupon in this Court is herewith transmitted and made part of this remittitur.

NOW THEREFORE, This MANDATE is to you directed and certified, to inform you of these proceedings in

our Supreme Court, in said hereinbefore mentioned cause, and the same is hereby and herewith REMANDED to your Court for such other or further record and proceedings therein as may be by law necessary, just and proper, under and by virtue of the said order herein made.

WITNESS, The Honorable ROBERT J. SHERAN, Chief Justice of the Supreme Court aforesaid, and the seal of said Court at St. Paul, this September 27, 1976.

JOHN McCARTHY
Clerk of the Supreme Court
By /s/ WAYNE TSCHIMPERLE
Deputy

STATE OF MINNESOTA, SUPREME COURT

45556

JEFFREY D. SAVCHUK,

Respondent,

vs.

RANDAL RUSH and STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, garnishee,

Appellants.

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the order of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Henne-

pin be and the same hereby is in all things affirmed.

And it is further determined and adjudged that respondent herein, do have and recover of appellants herein the sum and amount of Three Hundred Twenty-Five and 99/100 DOLLARS, ($325.99) costs and disbursements in this cause in this Court, and that execution may be issued for the enforcement thereof.

Dated and signed September 27, 1976.

BY THE COURT

Attest:

JOHN McCARTHY
Clerk

STATEMENT FOR JUDGMENT

Statutory Costs	$ 25.00
Printer	$300.99
Total	$325.99

Satisfaction of Judgment filed

Therefore the above judgment is duly satisfied in full and discharged of record.

Attest:
Clerk

SUPREME COURT

ss

State of Minnesota

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the

Entry of Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, September 27, 1976.

JOHN McCARTHY
Clerk
By /s/ WAYNE TSCHIMPERLE
Deputy

APPENDIX D

STATE OF MINNESOTA
IN SUPREME COURT

45556

JEFFREY D. SAVCHUK,
Plaintiff-Appellee,

vs.

RANDAL RUSH,
Defendant-Appellant,

and

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,
Garnishee-Appellant.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that defendant Randal Rush and the garnishee State Farm Mutual Automobile Insurance Company, the appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Minnesota affirming the previous order of the Hennepin County District Court for the State of Minnesota conferring jurisdiction of the Minnesota courts herein and which judgment was entered by the Supreme Court of the State of Minnesota in this action on September 27, 1976.

This appeal is taken pursuant to 28 U.S.C. §1257(2) and, alternately 28 U.S.C. §2103.

MEAGHER, GEER, MARKHAM, ANDERSON, ADAMSON, FLASKAMP & BRENNAN
By /s/ O. C. ADAMSON II
By /s/ JAMES F. ROEGGE
2250 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402
Telephone: (612) 338-0661
Attorneys for Appellants

[This Notice of Appeal was filed with the Hennepin County District Court on November 15, 1976.]

STATE OF MINNESOTA
ss
COUNTY OF HENNEPIN

AFFIDAVIT OF SERVICE BY MAIL

Lynn K. Zander, being first duly sworn, deposes and says:

That on the 12 day of November, 1976, she served the attached Notice of Appeal to the Supreme Court of the United States upon the following attorneys representing the parties as indicated, by depositing a true and correct copy thereof in the U. S. Mail in the City of Minneapolis, Hennepin County, Minnesota, with postage prepaid, in an envelope directed and addressed to said attorneys.

Mr. Richard I. Diamond, Attorney at Law, Schermer, Schwappach, Borkon & Ramstead, Ltd., 1010 Midwest Plaza Building, Minneapolis, Minnesota 55402, Attorney for Jeffrey D. Savchuk.

Mr. Richard B. Allen, Solicitor General, Office of the Attorney General, 160 State Office Building, St. Paul, Minnesota 55155, Attorney for State of Minnesota.

/s/ LYNN K. ZANDER

Subscribed and sworn to before me this 12 day of November, 1976.

/s/ MARGARET R. RASMUSSEN
Notary Public
Hennepin County, Minn.

My Commission Expires Nov. 2, 1982.

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FOURTH DIVISION

THOMAS E. MILES,

Plaintiff,

vs.

MOMSEN TRUCKING COMPANY, a foreign corporation,

Defendant,

and

NATIONAL INDEMNITY COMPANY,

Garnishee.

MEMORANDUM ORDER

4-75 Civ. 378

GREGORY P. JOSEPH, Esq., Minneapolis, Minnesota, appeared for the plaintiff.

MARK L. WILSON, Esq., Schermer, Schwappach, Borkon & Ramstead, Minneapolis, Minnesota, appeared for defendant and garnishee.

This matter comes before the court upon the motion of the defendant to dismiss this action and garnishment pursuant to Rule 12 of the Federal Rules of Civil Procedure on the ground that this court lacks jurisdiction over the subject matter, lacks personal jurisdiction over the defen-

dant and garnishee, and insufficiency of process and service of process.

The action arises out of a motor vehicle accident which occurred in Mason City, Iowa on November 14, 1973. The defendant, Momsen Trucking Company, was a resident and citizen of the State of Iowa at that time and at all times since. The plaintiff was a resident and citizen of the State of Iowa at the time of the motor vehicle accident; however, since the accident he has become a resident and citizen of the State of Minnesota.

Filed Sep. 30, 1976.

HARRY A. SIEBEN
Clerk
By COPY ILLEGIBLT
Deputy

The garnishee, National Indemnity Company, was served with a garnishment summons, served upon the Commissioner of Insurance of the State of Minnesota on July 31, 1975. The defendant, Momsen Trucking Company, was served with a copy of the summons and complaint and the garnishment summons on August 7, 1975 at Mason City, Iowa.

The issue raised by the present motion is whether or not a Minnesota Federal Court has *quasi in rem* jurisdiction over an action arising from a motor vehicle collision which occurred in the State of Iowa brought by a plaintiff who was an Iowa resident at the time of the collision, a Minnesota resident at the time of the commencement of the action, and who has garnished the automobile insurer

which issued the policy of liability insurance covering the defendant's potential liability and which does business in the State of Minnesota.

The issue thus presented as regards the district courts of Minnesota has recently been decided by the Supreme Court of Minnesota in *Savchuk v. Rush et al*, — Minn. —, — N.W.2d —, No. 45556 (Minn. Sup. Ct. filed September 10, 1976). It was there held, first, that Minn. Stat. § 571.41, Subd. 2 authorizes *quasi in rem* jurisdiction in this circumstance, and second, that due process requirements are met provided: (1) proper notice was given to the defendant-insured; (2) the potential exposure of the defendant was limited to the coverage limits of the insurance policy; and (3) the plaintiff was a resident of the forum state.

Following *Rintala v. Shoemaker*, 362 F. Supp. 1044 (D. Minn. 1973), this same conclusion had been reached by two other judges of this court. *Bak v. Sneiderman*, 4-75 Civ. 123 (D. Minn. filed July 23, 1975) (Judge Larson); *Reiter v. Freeburg*, No. 4-75 Civ. 145 (D. Minn. filed June 24, 1975) (Judge Lord). Since the decision in *Savchuk*, the same result has recently been reached by Chief Judge Devitt. *Jeans v. Mitchell*, No. 2-76 Civ. 197 (D. Minn. filed September 15, 1976).[1]

In this diversity case, this court is bound to follow the decision of the Minnesota Supreme Court as regards the

[1]In *Bak* and *Jeans* the plaintiffs were residents of Minnesota both at the time of the accident and at the time of the commencement of the action. In *Savchuk* and in the case at bar the plaintiffs were not Minnesota residents at the time of the accident but were at the time of the commencement of the action. Such information is not contained in *Reiter*.

issue of the applicability of the Minnesota Garnishment Procedure in this circumstance. *Erie Railroad Co. v. Tompkins,* 304 U.S. 64 (1938).

Because the issue of asserting jurisdiction in the situation here presented involves an area where the need for judicial uniformity within the district is compelling, this court will follow the decisions of the cases cited in holding that the assertion of *quasi in rem* jurisdiction in this instance meets the constitutional standard of due process if 1) proper notice was given to the defendant-insured; 2) the potential exposure of the defendant is limited to the coverage of the insurance policy, and 3) the plaintiff is a resident of the forum state.

In this case, 1) the defendant has been personally served with a summons and complaint and a garnishment summons, 2) the plaintiff has by stipulation limited his recovery to the amount of liability insurance coverage and has agreed not to plead the result in this court as collateral estoppel or *res judicata* in any other forum, and 3) the plaintiff is a resident of Minnesota. Accordingly, the motion of the defendant to dismiss will be denied.

Even in denying defendant's motion, this court has serious reservations regarding the procedure here involved meeting the requirements of "due process", and is also concerned with the practical implications of the rule.

An inherent characteristic of the type of action under consideration is diversity of citizenship between the plaintiff and the defendant so as to invoke the diversity jurisdiction of this court under 28 U.S.C. § 1332. As a consequence, it seems reasonable to predict that a substantial portion of the litigation which will be commenced in Min-

nesota under these decisions will find its way into federal rather than into state court.[2]

The procedure here allowed was designed to "provide a forum to residents of this state." Minnesota residents who avail themselves of it may well find themselves in a forum already congested.[3] They may also find themselves in a forum required by Congress to give "expeditious" and "priority" consideration to twenty-eight categories of civil litigation other than theirs and to provide a "Speedy Trial" in all criminal cases. It is one thing to be permitted to commence an action in a Minnesota Court; in this court, it has become a more difficult accomplishment to get an action to trial. Adoption of the rule here followed as an effort to provide for Minnesota residents a forum for prompt resolution of their disputes may create a cruel illusion.

Upon the foregoing,

IT IS ORDERED That defendant's motion to dismiss be and the same hereby is denied.

Dated September 29, 1976.

/s/ DONALD D. ALSOP
United States District Judge

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[2]As Judge Devitt pointed out in *Jeans v. Mitchell, supra,* the federal court does not have readily available what the Minnesota Supreme Court in *Savchuk* described as the "most significant" procedure justifying the assertion of jurisdiction, i.e., dismissal on the grounds of *forum non conveniens.*

[3]A caseload of 1,814 pending cases as of August 31, 1976 handled by four active judges.